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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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RONALD KOEHLER,  
*Complainant,*

v.

DAYTON TOWN COUNCIL,  
*Respondent.*

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Formal Complaint No.  
18-FC-121

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Dayton Town Council (“Council”) violated the Open Door Law<sup>1</sup> (“ODL”). The Council did not file an answer despite an invitation to do so on September 10, 2018. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on August 30, 2018.

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<sup>1</sup> Ind. Code §§ 5-14-1.5-1 to -8

## BACKGROUND

Ronald Koehler (“Complainant”) filed a formal complaint alleging the Dayton Town Council (“Council”) violated the Open Door Law (“ODL”) by providing defective public notice for an executive session held by the Council on August 16, 2018 and by discussing an impermissible subject matter at the executive session. Notably, Koehler is a member of the Council.

Koehler filed a formal complaint through his attorney Peter S. Kovacs on August 30, 2018 claiming the public notice and subject matter discussed at the executive session violated the ODL.

On August 16, 2018 the Council met in executive session. The public notice merely cited “Ind. Code 5-14-1.5-6.1 (discussion on purchasing land)” as the statutory justification for the meeting. Presumably, the notice referred to Indiana code section 5-14-1.5-6.1(b)(2)(D) which authorizes “discussion of strategy with respect to ... [t]he purchase or lease of real property by the governing body up to the time a contract or option to purchase or lease is executed by the parties.”

Furthermore, the executive session itself was a preliminary discussion regarding a preliminary proposal for the purchase of a tract of land. Koehler takes exception that two preliminary bargaining adversaries were present at the executive session (himself and another Council member). Therefore, Koehler contends the executive session was *de facto* illegal based upon the latter portion of Indiana Code section 5-14-1.5-6.1(b)(2) which states “all such strategy discussions must be necessary for competitive or bargaining

reasons and may not include competitive or bargaining adversaries.”

The Town Council did not file an answer to the complaint with this Office but did make an informal preliminary argument via email as a precursor to the filing of the complaint. This Office stated in those conversations that strategic discussions could include preliminary deliberation as to whether a real estate acquisition would be pursued in earnest.

## ANALYSIS

The issues in this case are whether the public notice of the Dayton Town Council’s executive session on August 16, 2018 is defective under the Open Door Law and whether executive session itself was permitted under the law based on the subject matter of the meeting.

### 1. The Open Door Law

It is the intent of the Open Door Law (“ODL”) that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* Ind. Code § 5-14-1.5-1. Accordingly, except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. Ind. Code § 5-14-1.5-3(a). The Dayton Town Council is a governing body of a public agency; and thus, subject to ODL. *See* Ind. Code § 5-14-1.5-2(b). So, unless an exception applies, all meetings of the Council must be open at all times to allow members of the public to observe and record.

### 1.1 Public Notice of Executive Sessions

Koehler contends that the Council provided inadequate notice of its executive session by failing to state the subject matter of the meeting by specific reference to the enumerated instance or instances for which the executive session may be held, thereby violating the ODL.

Indiana Code section 5-14-1.5-5(a) requires the governing body of a public agency to give “[p]ublic notice of the date, time, and place of any meetings, executive sessions, or of any reconvened meeting...”

*Executive session* is defined as “a meeting from which the public is excluded, except the governing body may admit those persons necessary to carry out its purpose.” Ind. Code § 5-14-1.5-2(f). A governing body may only hold an executive session in specific instances set forth in statute. *See* Ind. Code § 5-14-1.5-6.1(b)(1) to (15).

Notably, Indiana Code section 5-14-1.5-6.1(d) requires the public notice of an executive session to “state the subject matter by *specific reference* to the enumerated instance or instances for which executive sessions may be held under subsection (b).”

The Council provided the following notice for the meeting disputed here:

TOWN NOTICE  
“Executive Session”  
“Closed Door Meeting”

Town Council of Dayton Indiana will hold an Executive Meeting on Thursday, August 16, 2018 at 6:00 P.M. at the Town Hall. This is a closed meeting. Ind. Code 5-14-1.5-6.1 (discussion on purchasing land)

Here, the language in the public notice does not comply with the ODL because it does not state the subject matter of the meeting by *specific reference* to enumerated instance that authorizes the session. Although section 6.1 governs executive sessions generally, only subsection (b) lists the specific instances when a public entity may hold an executive session. There are fifteen instances—some with multiple subparts—where an executive session is appropriate.

In other words, a mere reference to the executive session section of the ODL does not specifically reference the enumerated instance that authorizes the meeting. A specific reference to an enumerated instance would, by contrast, look something like this:

#### NOTICE OF EXECUTIVE SESSION

The Dayton Town Council will meet in executive session on Thursday, August 16, 2018 at 6:00 P.M. at Town Hall.

The Council will meet for a discussion of strategy with respect to the purchase or lease of real property as authorized by Indiana Code § 5-14-1.5-6.1(b)(2)(D).

Therefore the Open Door Law was violated as to notice. Normally, this Office and the Courts give cursory pause as to highly technical violations of the ODL, however, executive sessions, because of their secretive nature, are given

higher scrutiny. An agency must be particularly mindful of notice requirements for executive sessions.

### **1.2 The Subject Matter of the Executive Session**

Koehler also contends that the Council did not discuss the subject matter it purported to on the defective notice, thereby violating the ODL.

His reason being that the meeting included himself and another council member, both who are potential negotiation and bargaining adversaries in this scenario. Indiana Code section 5-14-1.5-6.1(b)(2) explicitly states: “all such strategy discussions must be necessary for competitive or bargaining reasons and may not include competitive or bargaining adversaries.” Simply put, an agency must exclude those adversaries from an executive session being held to discuss strategy with respect to the purchase or lease of real estate.

Regardless, the Complainant as a potential adversary was present and states the entirety of the discussion was to consider a preliminary engineering reports which reflected various purchasing options.

The statute itself allows strategic discussions. Considering options to purchase and reviewing related reports is immediately adjacent to purchasing strategy. Preliminary strategy is still strategy and so long as the preliminary strategic deliberations are germane to the acquisition of real estate, the executive session is justified.

If the Council then selects a property owner for a focused effort of acquisition of their real estate, then clearly that property owner should be excluded from the further executive sessions; this is especially so given that the property

owner is also a council member with a pending conflict of interest. But it would not stand to reason the council member would be excluded from erstwhile executive session as they are not yet a bargaining adversary.

## **CONCLUSION**

Based on the foregoing, it is the opinion of the Public Access Counselor that the Dayton Town Council has violated the Open Door Law by issuing defective notice of an executive session, but did not err in holding an executive session for the intended subject matter.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

**Luke H. Britt**  
**Public Access Counselor**